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In the Supreme Court of the United States

OCTOBER TERM, 1960

RICHARD L. JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

WILLIAM H. ORRICK, JR.,
Assistant Attorney General,

JOHN G. LAUGHLIN, JR.,
DONALD H. GREEN,
Attorneys, Department of Justice,
Washington 25, D. C.

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OPINION BELOW

The opinion of the Court of Claims (Pet. App. A, pp. 1a-10a) is reported at 282 F. 2d 906.

JURISDICTION

The judgment of the Court of Claims was entered on October 5, 1960. Petitioner's timely motion for reconsideration of the Court's order was denied on December 9, 1960 (Pet. App. B, p. 10a.). The petition for a writ of certiorari was filed on March 7, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether a retired Navy enlisted man, recalled to active duty and temporarily promoted to Lieutenant Commander under the provisions of the Temporary Promotions Act of 1941 and then released from active duty, is entitled to retired pay under the Pay Readjustment Act of 1942.

STATUTES INVOLVED

Section 15, Paragraph 4, of the Pay Readjustment Act of 1942, c. 413, 56 Stat. 359:

> The retired pay of any officer of any of the services mentioned in the title of this Act who served in any capacity as a member of the military or naval forces of the United States prior to November 12, 1918, hereafter retired under any provision of law, shall, unless such officer is entitled to retired pay of a higher grade, be 75 per centum of his active duty pay at the time of his retirement.

Section 10 of the Temporary Promotions Act of 1941, 55 Stat. 603, as amended, 60 Stat. 28 (emphasis added):

> Sec. 10. (a) Personnel appointed or advanced under the authority of this Act may be continued in their temporary status during such period as the President may determine, but not longer than six months after the termination of war or national emergency or, in the case of reserve and retired personnel, not longer than the period herein specified or the date of release from active duty whichever is the earlier and in no case longer than six months after the termination of

war or national emergency. *Upon the termination* of their temporary status such *personnel* on the active list of the Regular Navy and Marine Corps shall assume their permanent status and those *of the retired list* and of the respective Reserve Components, including the Fleet Reserve and the Fleet Marine Corps Reserve, *shall have, when returned to an inactive status*, the highest grade and rank in which, as determined by the Secretary of the Navy, they served satisfactorily under a temporary appointment, unless entitled to the same or higher grade and rank pursuant to section 8 of this Act, as now or hereafter amended.

(b) (1) Personnel of the retired list *returned* to an inactive status with higher rank pursuant to subsection (a) shall receive retired pay computed at the rate prescribed by law and applicable in each individual case but based upon such higher rank.

(2) Personnel of the active list of the Regular Navy and Marine Corps and personnel of the Fleet Reserve and Fleet Marine Corps Reserve appointed or advanced under the authority of this Act shall, when subsequently retired, if not otherwise entitled to the same or higher grade and rank or retired pay, be advanced to the highest grade and rank in which, as determined by the Secretary of the Navy, they served satisfactorily under temporary appointments, and shall receive retired pay computed at the rate prescribed by law and applicable in each individual case but based upon such higher rank.

(c) Personnel of the classes described above who have been retired or released from active duty prior to [February 21, 1946], shall be en-

ed to the benefits of this section *from the date retirement or release from active duty*, as the e may be.

(d) Personnel accorded higher rank pursuant this section shall, if subsequently assigned ive duty, be recalled to active duty in the des, ranks or ratings, with which they were ired or returned to an inactive status unless ler other provisions of law they are entitled igher grades, ranks, or ratings.

* * * * *

STATEMENT

facts before the court below were stipulated y be summarized as follows: Petitioner first in the Navy on December 10, 1909, as an ice seaman. Through successive terms of en- t, he served until December 31, 1921, when honorably discharged for the convenience of ernment. Petitioner reenlisted in the regular on July 18, 1922, as a Quartermaster, 1st He then served on active duty until June 26, at which time he was transferred to Class of the Fleet Naval Reserve with the rank of Quartermaster, permanent appointment. On 1939, he was placed on the retired list of the vy in the grade of Chief Quartermaster, per- appointment.

oner was recalled to active duty on April 13, id, while serving on active duty, he was suc- promoted to Lieutenant (Jr. Grade), to ant, and finally, on June 1, 1946, to Lieu- Commander. All promotions were temporary

appointments made in accordance with the Temporary Promotions Act of July 24, 1941, *supra*, p. 2. Petitioner was released from active duty on October 3, 1946, at which time his temporary appointment as Lieutenant Commander was terminated. He then reverted to his permanent enlisted status as a Chief Quartermaster and was immediately advanced on the retired list to his temporary rank of Lieutenant Commander.

Since July 1, 1950, petitioner has been receiving retired pay computed at the rate prescribed in statutes applicable to Navy enlisted men, but based upon the pay of his rank as Lieutenant Commander on the retired list. By his suit in the Court of Claims, petitioner sought to recover the difference between his present retirement pay and retirement pay computed upon the basis of 75 per cent of his active duty pay as a Lieutenant Commander, as provided in Section 15, Paragraph 4 of the Pay Readjustment Act of 1942, *supra*, p. 2.

On cross motions for summary judgment, the Court of Claims held, on the facts of the case and as a matter of statutory application, that petitioner's retirement rights are derived solely from Section 10(a) and 10(b) of the Temporary Promotions Act of 1941 and that he was not entitled to the pay rate provided by Paragraph 4 of Section 15 of the Pay Readjustment Act of 1942.

ARGUMENT

On the facts pertinent to petitioner's case, and as a matter of plain statutory application and construc-

tion, petitioner is not entitled to the retired pay benefits prescribed by Paragraph 4 of Section 15 of the Pay Readjustment Act of 1942. The decision of the Court of Claims is, therefore, clearly correct and further review by this Court is not warranted.

Prior to his release from active Navy duty on October 3, 1946, petitioner was serving under a temporary appointment as a Lieutenant Commander pursuant to Section 10 of the Temporary Promotions Act of 1941. Section 10(a) of that Act specifically provided that petitioner's temporary appointment as an officer would terminate on the date of his release from active duty and that, upon the termination of his temporary status, he would assume his "permanent status," *i.e.*, his permanent enlisted status as a Chief Quartermaster, retired. When he returned to an inactive status in accordance with Section 10(a), petitioner was entitled to, and has been accorded, the highest rank on the retired list in which, as determined by the Secretary of the Navy, "[he] served satisfactorily under a temporary appointment * * *." And, by Section 10(b) of the Temporary Promotions Act of 1941, upon his return to an inactive status with the higher rank in which he served satisfactorily, petitioner was entitled to, and is receiving, "retired pay computed at the rate prescribed by law * * * but based upon [his] higher rank" as Lieutenant Commander.

Section 10 of the Temporary Promotions Act is, of itself, definitive and dispositive of petitioner's rights. His claim to the more remunerative benefits of Section 15, Paragraph 4, of the Pay Readjustment

Act of 1942 is plainly without merit. Section 15, Paragraph 4, applies only to officers of the Regular Navy "hereafter retired." *Danielson* v. *United States*, 121 C. Cls. 533. After serving under a temporary appointment as an officer in the Regular Navy, petitioner was released from active duty, but he was not and could not have been retired as a Regular Navy officer. It follows that the court below was correct in holding that, on the facts of petitioner's case, he does not qualify for retired pay pursuant to Section 15, Paragraph 4, of the Pay Readjustment Act of 1942 (Pet. App. A, p. 9a).

The decision is not, moreover, at variance with the legislative history of the 1946 Amendment to the Temporary Promotions Act. Consistent with the import of petitioner's extracts from the committee hearings on the 1946 amendment (Pet. 7-8), petitioner's service in the higher temporary rank of Lieutenant Commander is recognized in the retired pay he currently receives pursuant to Section 10(b) of the Temporary Promotions Act.[1] In addition, on the retired list he carries the highest rank held during the war. By the plain terms of the controlling statute, he is entitled to no more.

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[1] Petitioner's retirement rate is presently computed under Section 511 of the Career Compensation Act of 1949, 63 Stat. 802, 829, which applies to all retired members of the services.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

WILLIAM H. ORRICK, JR.,
Assistant Attorney General.

JOHN G. LAUGHLIN, JR.,
DONALD H. GREEN,
Attorneys.

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